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CITATIONS

758512—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. —

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

JOHANNA M. KIND AND HERMANN H. KIND, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HERMANN KIND, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 426–442) is reported at 161 F. 2d 36. The opinion of the District Court (R. 404–424) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on April 9, 1947 (R. 442). On July 8, 1947, Mr. Chief Justice Vinson extended the time for filing a petition for certiorari until September 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a suit under Section 9 (a) of the Trading with the Enemy Act, as amended, a court of equity should entertain a claim for an interest in enemy property which has been vested by the Alien Property Custodian where that interest had been used to effectuate a scheme to conceal the enemy's interest and thereby to defraud the United States and frustrate its laws.

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, as amended, are set forth in the Appendix, *infra,* pp. 13–17.

STATEMENT

The plaintiffs, Johanna M. and Hermann H. Kind, are the trustees and, with two others, the beneficiaries of the estate of Hermann Kind (R. 184–186). They are citizens and residents of the United States (R. 28–30, 179). Prior to Septem-

ber 1939, J. A. Henckels K. G., a German copartnership, owed the estate $130,000. Of this sum $55,000 was owed directly and $75,000 represented a guarantee of a debt owed the estate by one Iwersen, a national and resident of Germany and until 1944 a cotrustee of the estate (R. 428). The $75,000 debt, and possibly the entire sum, was secured by a pledge by Henckels K. G. of the stock of Graef & Schmidt, Inc., the property in question (R. 428). In the fall of 1939, shortly after the outbreak of war in Europe, the trustees of the estate purported to release the indebtedness of $130,000 in consideration of the transfer by Henckels K. G. to the estate of all right, title, and interest in the pledged shares (R. 429–430). The formal mechanics of this "release" and "transfer" were an offer by counsel for the trust estate and an acceptance by Iwersen and another in behalf of Henckels K. G. (R. 429–432).

In fact, however, Hermann H. Kind and Iwersen (both being trustees and the latter general manager of Henckels) by correspondence made it clear that this ostensible transfer was a sham and that their true intention was to preserve for Henckels K. G. any amount remaining after satisfaction of the indebtedness (R. 429–436, 440). Johanna M. Kind, the third trustee, was the settlor's widow and the mother of Hermann H. Kind (R. 28–30). While the Circuit Court of Appeals "reluctantly" accepted the District Court's find-

ing that she did not have actual knowledge of the cloaking agreement between her son and Iwersen (R. 440), there can be no dispute, from her testimony, that she had accepted Hermann's word as to what was being done; that she trusted Hermann to "take care of everything"; that, while he "would explain things in a general way" to her, she "left almost everything to him, the details"; and that she had heard of Iwersen's proposal to hold the surplus for the benefit of Henckels, but could not remember whether she had learned of it at the time of the "transfer" (R. 181, 182, 436–437).

In 1943, the Alien Property Custodian,[1] having determined Henckels K. G. to be the beneficial owner, vested the stock as the property of an enemy national (Vesting Order No. 770, January 27, 1943, 8 F. R. 2453; R. 12–14). In 1945, the Alien Property Custodian vested all claims of Henckels K. G. against the estate, including a claim for $63,000 received by the plaintiffs after the "transfer" as regular and liquidating dividends on the stock (Vesting Order No. 5225, September 14, 1945, 10 F. R. 11913; R. 24–26, 437).

The plaintiffs brought this action under Section 9 (a) of the Trading with the Enemy Act, seeking

[1] By stipulation and order dated October 29, 1946, the Attorney General was substituted as defendant, as successor to the Alien Property Custodian (R. 1), pursuant to Executive Order No. 9788 (11 F. R. 11981), which transferred to the Attorney General the property held by the Custodian.

the return of the stock, or, in the alternative, an adjudication, and satisfaction by the Custodian, of a security interest in the stock (R. 1, 11–12). The Custodian filed a counterclaim for the $63,000 (R. 23–26).

The District Court directed the return of the stock to the plaintiffs and dismissed the counterclaim (R. 404, 424). The Circuit Court of Appeals, finding the purported release and transfer of the shares a "mere form employed to deceive the United States", held that "no actual purchase and sale occurred", and reversed the judgment of the District Court insofar as it revested title to the stock in the plaintiffs (R. 440, 442). But the court concluded that the estate retained its claim against Henckels K. G., that it might "keep, as in reduction of that claim, the 'dividends' it received" and that it might assert its pledgee's lien on the stock for the unpaid balance of the claim (R. 441, 442), thus granting the alternative relief requested by the plaintiffs.

REASONS FOR GRANTING THE WRIT

1. In this war, as in the last, the enemy has made determined efforts to cloak its interests in property, i. e., to conceal enemy ownership behind ostensible American or neutral owners in an effort to frustrate the enforcement of the Trading With the Enemy Act. *Report of the Alien Property Custodian,* February 22, 1919, pp. 11–12, 39–41; *Annual Report, Office of Alien Property*

Custodian, June 1944, pp. 28–29. Indeed, in this war, cloaking was supervised by the German Ministry of Economics, which issued secret orders for the concealment of German property abroad. Exhibit AAA–1, R. 259–262; *Brassert* v. *Clark,* decided July 30, 1947 (C. C. A. 2); *Elimination of German Resources for War,* Hearings before a Subcommittee of the Senate Committee on Military Affairs, 79th Congress, 1st Sess., 1945, p. 1203 and *passim.* The Custodian has already vested some 300 interests on the ground that they were cloaked for Germans, the property involved having an estimated value, exclusive of patents, of $100,000,000. Investigation of suspect transactions is still going forward in Germany and in this country.

The techniques of cloaking have been varied and intricate, and the camouflaged situations thereby created most complex. *Elimination of German Resources for War, supra,* pp. 580–583. But all cloaking has had a common denominator—the enemy has attempted first to find someone who could be trusted and who might reasonably be supposed to be the real owner. For this role a pledgee, and particularly a pledgee whose interest predated the period of anticipation of the war, is ideally suited. Protection of his own interests affords a plausible justification for acquiring ownership, and the release of the indebtedness can be advanced as the consideration for the transfer. It is not surprising, therefore, that

some variant or other of the pledge relationship should have been found present in many of the cloaking arrangements thus far uncovered.

In the present case, the first on cloaking to be decided by an appellate court in this war, the cloak was an American estate which had a *bona fide,* long-existing pledge interest in the property to be concealed, and these circumstances were utilized in the attempt to defraud the United States and frustrate its exercise of a war power. The fraud having been detected and the cloak thrust aside, the plaintiffs asked equity to reinstate them in the position they held before the fraud. Whether such a claim should be entertained is an important issue, not only because it bears upon the other cloaking cases, but also because it raises broad questions of the extent to which courts of equity should entertain claims against the Government arising out of transactions which had victimization of the Government as their objective.

2. A suit under Section 9 (a) is, by the terms of that Section, a suit "in equity" (Appendix, *infra,* pp. 14, 15). One who seeks relief under Section 9 (a) must, therefore, come with the clean hands required of all plaintiffs in equity. *Robertson* v. *Miller,* 286 Fed. 503 (C. C. A. 2), affirmed, 266 U. S. 243. Cf. *Waldes* v. *Schall,* 11 F. 2d 444, 451 (S. D. N. Y.). In the light of the finding of the Circuit Court of Appeals that the exchange

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of the pledge interest for title was "a mere form employed to deceive the United States" (R. 440), a court of equity should not lend its processes to permit the wrongdoers to salvage their former interest.

In the course of applying the clean-hands doctrine, it has been held, in a variety of situations, that one who has misused his property in the attempted perpetration of a fraud cannot invoke the aid of equity to reinstate or enforce his rights in that property. Cf. *Railroad Co.* v. *Soutter,* 13 Wall. 517, 523; *Commonwealth Finance Corp.* v. *McHarg,* 282 Fed. 560, 571 (C. C. A. 2); *Baldwin* v. *Short,* 125 N. Y. 553. The principle is applied with particular breadth and vigor where the public—or the United States—is the intended victim of the misconduct, so that "the financial element in the transaction is not the sole or principal thing involved." (*Pan American Co.* v. *United States,* 273 U. S. 456, 509.) *Worden* v. *California Fig Syrup Co.,* 187 U. S. 516; *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488, 493–494. Cf. *United States* v. *Trinidad Coal & Coking Co.,* 137 U. S. 160, 170; *Causey* v. *United States,* 240 U. S. 399, 402. The courts must be studious to extend no welcome to those who do not "turn square corners when they deal with the Government" (Mr. Justice Holmes in *Rock Island, A. & L. R. Co.* v. *United States,* 254 U. S. 141, 143).

In prize law there exists the related, equally applicable doctrine, that one who has misused his name and property in order to cloak enemy property cannot, when the cloak has been uncovered and the property seized, recover his property employed in the "iniquitous adventure." *The St. Nicholas,* 1 Wheat. 417, 419, 431; *The Fortuna,* 3 Wheat. 236, 245; *Carrington* v. *Merchants' Insurance Co.,* 8 Pet. 495, 520–521. The explicit provision in the Trading With the Enemy Act for the forfeiture of all property concerned in a violation of the Act, as well as for fine and imprisonment of the offender (Section 16, Appendix, *infra,* p. 16) should not be taken to preclude the invocation of the traditional defense of unclean hands, or the related defense available in the prize cases, but rather as confirmation that like results, when compelled by familiar equitable principles, are consistent with the policy of the Act. Cf. *Bement* v. *National Harrow Co.,* 186 U. S. 70, 87–88; *Continental Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227; *The Hampton,* 5 Wall. 372, 376. See *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, 177.

These principles are no less germane here because the fraud in this case was effected by the use of property in trust. It has long been recognized that property cannot be insulated from the effects of prize and analogous law by the divorce of possession and control from ownership. *Restatement, Trusts,* Sec. 273, Comment e; *The*

Hiram, 1 Wheat. 440; *The Hampton,* 5 Wall. 372; *Dobbins' Distillery Co.* v. *United States,* 96 U. S. 395; cf. *Mitchell* v. *Sherman E. McEwen Associates, Inc.,* 360 Ill. 278. On the facts here, therefore, it is immaterial that one trustee (Johanna) was not shown to have been explicitly informed of the cloaking agreement which was devised by her co-trustees. The considerations of policy applicable to equitable owners, guilty of neither fraud nor negligence, apply with greater force to a sleeping trustee who, in dereliction of her duty, has abandoned control of the property to co-trustees whom she had at the least strong reason to suspect of employing it to cloak enemy property. Cf. *American Insurance Co.* v. *Lucas,* 38 F. Supp. 896, 923 (W. D. Mo.), appeal dismissed, 314 U. S. 575, affirmed *sub. nom. American Insurance Co.* v. *Scheufler,* 129 F. 2d 143 (C. C. A. 8), certiorari denied, 317 U. S. 687, rehearing denied, 317 U. S. 712. Johanna was apparently no more than a straw co-trustee, whose role it was to remain inactive so long as things went according to plan but to be brought forward in the robes of innocence if they did not. Cf. *The Hampton, supra.*

But even if Johanna's abdication of her responsibilities as trustee were insufficient to disqualify her from relief, there could be no justification for permitting the facilities of an equity court to be used by Hermann H. Kind, who, while both a trustee and beneficiary of the estate, know-

ingly participated in the cloaking scheme. Certainly a court of equity should not help him to recover his substantial share[2] in the property which he used to effectuate the fraud.

For the same reasons as apply to the claim for reinstatement of the pledge, there is error in the holding of the court below that the plaintiffs may retain the $63,000 which they received as dividends while the stock was in their possession and ostensible ownership pursuant to the sham transfer. Henckels K. G. has been held to have been the true owner of the shares in question at the time the dividends were paid, and the Custodian has vested the claims of Henckels K. G. against the estate, including this claim for $63,000. We believe there is no legal or equitable ground for treating the $63,000 differently from the remainder of the plaintiffs' security interest in the stock. If, as we maintain, the plaintiffs are equitably disqualified from asserting this lien, they should not be awarded partial satisfaction in the amount of the dividends.

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[2] The will of the elder Hermann Kind in substance directs that the income from the trust estate be paid to Johanna for life and that upon her death the principal "be divided into as many equal parts as I shall have left children me surviving, then living, and children who shall have died, leaving lawful issue then living," such equal parts to be transferred and paid over per stirpes (R. 185, 186). The elder Kind was survived by Hermann H. and two other children, all of whom are now living; two of the children have issue, and Johanna is still alive (R. 29).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1947.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31):

SEC. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5 (b):

* * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 9 (as amended by the Act of March 4, 1923, c. 285, 42 Stat. 1511):

(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, as-

signed, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a

party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SEC. 16. That whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of

any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States.

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No. 326

IN THE

Supreme Court of the United States

October Term, 1947

JOHANNA M. KIND and HERMANN H. KIND, as Trustees under the Last Will and Testament of HERMANN KIND, Deceased,

Cross-Petitioners,

against

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF AND APPENDIX IN SUPPORT THEREOF.

ARNOLD T. KOCH,
Counsel for Cross-Petitioners, Johanna M. Kind and Hermann H. Kind, as Trustees under the Last Will and Testament of Hermann Kind, Deceased.

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IN THE

Supreme Court of the United States

October Term, 1947

JOHANNA M. KIND and HERMANN H. KIND, as Trustees under the Last Will and Testament of HERMANN KIND, Deceased,

Cross-Petitioners,

against

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Johanna M. Kind and Hermann H. Kind, as Trustees under the Last Will and Testament of Hermann Kind, Deceased, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit in the above entitled action and respectfully show to this Honorable Court:

Statement of Case.

This action was commenced in the United States District Court for the Southern District of New York, on the basis of Section 9 of the Trading With the Enemy Act, as Amended (40 Stat. 411 *et seq.*; 50 U. S. C. App. Sec. 9), pursuant to which your petitioners as Trustees under the Last Will and Testament of Hermann Kind, Deceased, sought to recover in the alternative: (1) the return of 100 shares (the entire issue) of capital stock of Graef & Schmidt, Inc., a New York corporation, or (2) the adjudication of a security interest in that stock to the extent of $89,074.11 (with interest from March 31, 1944) and payment of that sum from defendant. This stock had been vested by the Alien Property Custodian pursuant to Vesting Order No. 770 dated January 27, 1943. In his answer the defendant denied both of plaintiffs' claims, and in a counterclaim sought to recover from plaintiffs the sum of $63,000 with interest, because of the payment to and receipt by plaintiffs of certain dividends on the stock. On October 29, 1946 the Attorney General was substituted as defendant as successor to the Alien Property Custodian.

After a trial before Judge JOHN W. CLANCY judgment was entered August 1, 1946 in the District Court in favor of the plaintiffs awarding the vested stock to them and dismissing the defendant's counterclaim. On appeal by the defendant the Circuit Court of Appeals for the Second Circuit by judgment entered April 9, 1947 affirmed the dismissal of the counterclaim, but, to the extent that the judgment of the District Court revested title to the stock in the plaintiffs it was reversed, and the case was remanded to the District Court for a determination of the amount of plaintiffs' lien on the stock and for relief with respect thereto.

Jurisdictional Statement.

The basis upon which it is contended that this Court has jurisdiction to review the judgment of the Circuit Court of Appeals are the provisions of Section 240(a) of the Judicial Code (28 U. S. C. Sec. 347).

Your petitioners' time to file their petition for certiorari herein was extended to September 6, 1947 by order made by Chief Justice VINSON dated July 8th, 1947.

The defendant herein has also petitioned the Court for a writ of certiorari herein and in connection therewith has presented to this Court a certified copy of the transcript of the record in the courts below. Accordingly your petitioners herein respectfully refer this Court to said transcript in support of this cross-petition.

The Questions Presented.

1. Whether the Circuit Court was justified in ignoring or setting aside the findings of fact made by the Trial Court when they were amply supported by written and oral evidence.

2. Whether the Circuit Court did not base its decision on suspicion and in the face of uncontradicted evidence to the contrary, and thus deprive your petitioners of due process of law.

3. Whether the Circuit Court did not err in holding that the sale of the stock on the basis claimed by petitioners deviated from normal business behavior.

4. Whether the Circuit Court did not err in holding that one of the trustees Hermann H. Kind intended that the seeming purchase of the stock by the estate should not

be a reality but a mere form employed to deceive the United States.

5. Whether the Circuit Court did not err in holding as a matter of law that the unexpressed intention of said trustee was binding on the estate.

6. Whether the Circuit Court did not err in holding as a matter of law that the estate never gave a real assent to the purchase of the stock.

7. Whether the Circuit Court did not err in holding that the alleged lack of assent by the estate was known to the sellers.

Statutes Involved.

The relevant provisions of the Trading With the Enemy Act, as Amended, are set forth in the Appendix, *infra,* pages i and ii.

Reasons For the Allowance of the Writ.

1. The Circuit Court violated Rule 52(a) of the Rules of Civil Procedure, when it reversed findings of fact which had ample evidence to support them.

2. The Circuit Court's reversal of the Trial Court's findings of fact was in conflict with the decisions of the Circuit Court of Appeals for the Sixth, Seventh, Ninth and Tenth Circuits.

3. The Circuit Court's reversal of the Trial Court's findings of fact was in conflict with its own decisions in other cases.

4. The Circuit Court has decided an important question involving the law of trusts which is clearly in conflict with the decisions of the New York courts.

5. The decision of the Circuit Court is in conflict with and contrary to the decision of this Court as to the purpose of the Trading With the Enemy Act.

6. The decision of the Circuit Court is in conflict with the decision of the Federal Courts following World War I as to the type of property or property rights which may be seized by the Alien Property Custodian.

7. This will be the first so-called "cloaking case" of World War II to be reviewed by this Court.

8. The question is one of importance in administering the provisions of the Trading With the Enemy Act.

These reasons are discussed in petitioners' brief (pp. 7 to 31, *infra*).

Wherefore your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled in its Docket No. 20452 (No. 206—October Term, 1946) *Johanna M. Kind and Hermann H. Kind, as Trustees under the Last Will and Testament of Hermann Kind, Deceased, Plaintiffs-Appellees* v. *Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, Defendant-Appellant,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judg-

ment herein of the said Circuit Court of Appeals be reversed by this Court to the extent that it reversed part of the judgment of the United States District Court for the Southern District of New York, and for such further or different relief as to this Court may seem proper.

Dated, New York, New York, September 5, 1947.

ARNOLD T. KOCH,
Counsel for Johanna M. Kind and Hermann H. Kind, as Trustees under the Last Will and Testament of Hermann Kind, Deceased, Cross-Petitioners.

Supreme Court of the United States

October Term, 1947

JOHANNA M. KIND and HERMANN H. KIND, as Trustees under the Last Will and Testament of HERMANN KIND, Deceased,

Cross-Petitioners,

against

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

BRIEF IN SUPPORT OF CROSS-PETITION FOR CERTIORARI.

Opinions of the Courts Below.

The opinion of Judge JEROME FRANK for the Circuit Court of Appeals for the Second Circuit is reported in 161 Fed. (2d) 36 and also appears in the certified copy of the Transcript of Record (R. 426, *et seq.*). The opinion of the District Court is not reported but appears in the transcript (R. 404, *et seq.*).

Jurisdiction.

Reference is made to the jurisdictional statement in the petition (p. 3).

Statement of the Case.

Reference is made to the "statement of case" in the petition (p. 2). Additional facts will be supplied in the discussion of several of the "points" herein.

Specification of Errors.

1. The Circuit Court erred in holding that the sale of the stock was not valid and *bona fide*.

2. The Circuit Court erred in holding that the estate could immediately have foreclosed on, and sold, the stock.

3. The Circuit Court erred in holding that the course adopted by the trustees in purchasing the stock lacked any trace of a businesslike motive.

4. The Circuit Court erred in holding that the action of the estate in purchasing the stock deviated from normal business behavior.

5. The Circuit Court erred in holding that no actual purchase and sale occurred.

6. The Circuit Court erred in holding that the trustee Hermann H. Kind intended that the purchase of the stock by the estate should not be a reality but a mere form employed to deceive the United States.

7. The Circuit Court erred in holding that the estate never gave a real assent to the purchase of the stock.

8. The Circuit Court erred in holding that the sellers knew that the trustee Hermann H. Kind did not intend to assent to the purchase of the stock.

9. The Circuit Court erred in holding that the sellers did not intend the sale to be a reality, and that the estate was on notice of that fact.

10. The Circuit Court erred in reversing the judgment of the District Court to the extent that it revested title to the stock in the petitioners.

Summary of Argument.

1. The Circuit Court violated Rule 52(a) of the Rules of Civil Procedure, when it reversed findings of fact which had ample evidence to support them.

2. The Circuit Court's reversal of the Trial Court's findings of fact was in conflict with the decisions of the Circuit Court of Appeals for the Sixth, Seventh, Ninth and Tenth Circuits.

3. The Circuit Court's reversal of the Trial Court's findings of fact was in conflict with its own decisions in other cases.

4. The Circuit Court has decided an important question involving the law of trusts which is clearly in conflict with the decisions of the New York courts.

5. The decision of the Circuit Court is in conflict with and contrary to the decision of this Court as to the purpose of the Trading With the Enemy Act.

6. The decision of the Circuit Court is in conflict with the decisions of the federal courts following World War I as to the type of property or property rights which may be seized by the Alien Property Custodian.

POINT I.

The Circuit Court violated Rule 52(a) of the Rules of Civil Procedure, when it reversed findings of fact which had ample evidence to support them.

The plaintiffs contend that on November 6, 1939, they, as trustees, became the sole owners of all of the stock of Graef & Schmidt, Inc. a New York corporation, pursuant to a written agreement made with J. A. Henckels Kommandit Gesellschaft of Solingen, Germany (hereinafter simply referred to as "Henckels K. G.") and one Emil Iwersen, who at that time was not only a co-trustee of the Kind Estate but also general manager of Henckels K. G.

A. Facts Not in Dispute:

The following facts are not disputed and were accepted by both the District Court and the Circuit Court:

Hermann Kind died in Richmond County, New York in 1928. He was born in Germany and came to the United States in 1888. He remained in this country until his death, having become a United States citizen in 1906 (R. 30). His wife, one of the plaintiff-trustees herein, was born in the United States 77 years ago, her mother having also been born here and her father, born in Germany, having come to this country at the age of 16 (R. 179).

At the time of his death in 1928 Hermann Kind was survived by his widow Johanna M. Kind, one of the plaintiff-trustees, and three children, Hermann H. Kind, the other plaintiff-trustee, and Ilse Kuch and Gertrude Benjamin. All three children were born in the United States and are married to citizens of the United States (R. 29).

At the time of his death in 1928 the decedent was president of two New York corporations, J. A. Henckels, Inc. and Graef & Schmidt, Inc. (not to be confused with the Graef & Schmidt, Inc. incorporated in New York in 1935, the stock of which is the subject of this action). These corporations were principally engaged in the importing and selling of high-priced cutlery manufactured in Solingen, Germany, by Henckels K. G., a partnership (R. 30, 56). At the time of his death the decedent owned 50% of the stock of the corporations of which he was president (R. 32). Following the probate of his will his widow, together with Emil Iwersen and a New York attorney, Montague Lessler, qualified as executors and trustees. Later in 1937, the decedent's son, Hermann H. Kind, also qualified as a trustee (R. 30). Shortly after this appointment the executors, in April, 1928, entered into a written agreement to sell the decedent's stockholdings in J. A. Henckels, Inc. and the old Graef & Schmidt, Inc. to Henckels K. G. for $171,421.07 payable $36,421.07 in cash and the balance over a period of 5 years with 6% interest (Ex. 3, R. 187). The down payment was thereupon loaned by the estate to the old Graef & Schmidt, Inc. together with additional moneys (R. 39). By January, 1930 J. A. Henckels, Inc. (into which the old Graef & Schmidt, Inc. had in the meantime merged) owed the estate a total of $99,000. Because of the depression in the United States (R. 35) and the Germany currency restrictions since 1934, neither J. A. Henckels, Inc. nor Henckels K. G. were able to meet their obligations under their original agreements with the estate, and various extension agreements were entered into (Ex. 2, R. 189; Ex. 4, R. 199; Ex. 5, R. 202).

In 1935, because of financial difficulties J. A. Henckels, Inc. was experiencing under an onerous long-term lease, merchandise valued at $99,000 was turned over by it to the

estate in satisfaction of its debt of the same figure, and this merchandise was then transferred to Iwersen, who had been president of the New York corporations since Kind's death, was a co-trustee of the estate, and still living in New York. Iwersen thereupon transferred the merchandise to a new corporation, Graef & Schmidt, Inc. for all of its stock (Ex. E, R. 219). As the result of two agreements entered into in August, 1935, Iwersen, Graef & Schmidt, Inc. and Henckels K. G. all became obligated to pay the estate a total of $154,000 and as security there was pledged all of the stock of Graef & Schmidt, in addition to the stock of J. A. Henckels, Inc. (the name of which was changed in 1935 to Fifth Avenue Cutlery Shop, Inc.) which had already been pledged the year before (Ex. 6, R. 226; Ex. 7, R. 228; R. 37). During the year 1937 pursuant to a further agreement made in 1936 (Ex. 9, R. 237) the indebtedness was reduced by $24,000 as the result of monthly payments made by Graef & Schmidt, Inc. (R. 39). These payments could not be continued in 1939 because the corporation's business was "bad" (Ex. DDD-1, R. 239) so that when the war broke out in Europe in September, 1939 the amount still owed to the estate was $130,000 and it held as security not only the stock of Graef & Schmidt, Inc. and Fifth Avenue Cutlery Shop, Inc. but also all the stock of a Canadian corporation known as J. A. Henckels, Ltd. (R. 39, 41). By October, 1939 the stock of the Canadian corporation had been seized by the Canadian Alien Property Custodian and the stock of Fifth Avenue Shop, Inc. was deemed worthless (R. 40, 44). Accordingly the stock of Graef & Schmidt, Inc. was the only security having substantial value. As of December 31, 1938 its book value, as certified by Arthur Young & Company was approximately $145,000 (R. 41; Ex. 10, R. 240). However, in April, 1939, because of an increase in tariffs, all further importations became prohibitive (R. 39)

and when war finally broke out in September, 1939 the corporation suffered a further jolt because about 75% of its merchandise was marked "Made in Germany", and sales therefore dropped (R. 40; Ex. TTT, R. 334, 338; Ex. QQQQ-1, R. 372, 374).

Although the trustee Montague Lessler had also been attorney for the estate, when he died early in 1939, the firm of O'Connor & Farber was engaged to represent the estate. Prior to that time that firm had already rendered legal services for the New York corporations (R. 30, 171; Ex. L-1, R. 244). When the war broke out, the only two trustees located in New York were Hermann H. Kind and his mother. Iwersen, the third trustee, had gone to Germany in 1937 to work for Henckels K. G. In addition he continued as president of Graef & Schmidt, Inc., made periodic trips to the United States and kept in constant touch with the New York management. As early as August 4, 1939 Iwersen wrote Hermann Kind "In the event of a war it goes without saying that you will assume the entire responsibility, that is, chiefly to the extent of the Estate's getting its money. In such an event all other considerations must be subordinated" (Ex. O, R. 251).

War having broken out Kind conferred with the estate's attorneys, O'Connor & Farber, as to the best methods of protecting the estate, and the attorneys, on October 24, 1939 sent a letter to Iwersen and Henckels K. G. and offered on behalf of the estate to release them of their respective debts totalling $130,000 in consideration of the release and transfer to the estate of the stock theretofore deposited with the trustee, Iwersen, as security, consisting of the stock of Graef & Schmidt, Inc., Fifth Avenue Cutlery Shop, Inc. and J. A. Henckels, Ltd. It was pointed out that by their acceptance the offer would become a binding agreement and that the estate might thereafter take what-

ever steps which it deemed advisable to transfer the securities to its name or the name of its trustees. Finally the attorneys designated the message which Iwersen and Henckels K. G. were to *cable* in the event they wished to accept the offer (Ex. 11, R. 290). The acceptance was cabled on November 6, 1939 in the exact language suggested by the attorneys (Ex. 12, R. 297). In addition Henckels K. G. and Iwersen also sent a more detailed acceptance by airmail on the stationery of Henckels K. G., which of course arrived subsequent to the receipt of the cablegram (Ex. 13, R. 300). With that letter Iwersen sent a covering letter on his personal stationery, advising the attorneys that he was sending the key to his personal safe deposit box in which the pledged stock was located. He then concluded his letter with the remark:

> "If we have given our unconditional consent it is with the clear understanding that the Estate will pay itself by administrating or possibly liquidating the corporations of our property, and, therefore, all values saved over and above the claims of the Estate of Hermann Kind will be held at my disposal or at the disposal of J. A. Henckels Kommandit-Gesellschaft as the interests may be" (Ex. 14, R. 301).

Iwersen's attempt to inject a condition to the acceptance of the estate's offer was rejected by the estate in a letter sent by its attorneys to Iwersen on November 28, 1939, copy of which had first been submitted to Kind for his approval, and the estate insisted on receiving a confirmation of the unconditional release of the stock (R. 43; Ex. 22, R. 315; Ex. 15, R. 316). A letter containing such confirmation in the exact language suggested by the attorneys for the estate was thereupon executed by both Henckels K. G. and Iwersen on December 12, 1939 (Ex. 16, R. 333). The stock was thereupon transferred into the name of the estate,

and Hermann H. Kind was elected president of Graef & Schmidt, Inc. in place of Iwersen, who, however, continued in the employ of the corporation in an advisory capacity (R. 92, 153) and received a salary until June, 1941 (Ex. KKKK-1, R. 396). Iwersen continued to act and advise as a co-trustee of the estate until December, 1941 when all communications ceased (R. 31). His powers as trustee were suspended by order of the Surrogate's Court in 1944 (R. 49).

After becoming the sole owner of the stock of Graef & Schmidt, Inc. consideration was given as to the best method of realizing on its stock. Accordingly Kind had consultations with the attorneys and inasmuch as the corporation owed substantial sums to creditors, including Henckels K. G. the office manager, Arthur Voss, and the bookkeeper, Bonner, were also consulted. On December 4, 1940 at a special meeting of stockholders the desire of the trustees of the estate to liquidate the business "in order to convert into cash" the stock of the corporation which they had acquired, was noted, and a plan of liquidation was thereupon adopted (Ex. 21, R. 387). As moneys were realized on the sale of merchandise, the corporation's debts were paid off. It was not until 1941 that Henckels K. G. had received all the moneys due it, totalling $134,000, and the accountants reported that on August 25, 1941, they had received confirmation from Henckels K. G. "to the effect that all claims by or against them had been settled" (Ex. 39, R. 397, 398).

While one liquidating dividend of $15,000 was paid to the estate in December, 1940, additional dividends were not paid until it appeared certain that the creditors would be paid in full. During 1941 the estate received in all $43,000 representing liquidating dividends (R. 23).

B. The Circuit Court's Opinion.

Judge FRANK, writing for the Circuit Court of Appeals, found that no actual purchase and sale of the stock had occurred and therefore disagreed with the findings and conclusions made by the District Judge. As the basis of his contention Judge FRANK maintained (1) that the transfer or purchase of the stock by the estate as negotiated by its attorneys was so lacking of any businesslike motive and deviated "so strikingly from normal business behavior" that he thought "it incredible that the purchase of the stock and the release of the $130,000 claim were in good faith" (R. 439), and (2) that because of the foregoing and certain comments in some of the exhibits Hermann H. Kind did not really intend that the deal which he and his mother had permitted their attorneys to conclude with Henckels K. G. and Iwersen was to be real and binding, and that accordingly the estate had not legally consented to the deal since unanimous consent of the trustees was required (R. 440).

C. Evidence Supporting the Trial Court's Decision.

The District Judge not only had before him all of the exhibits which were contained in the Appendix submitted to the Circuit Court of Appeals, but he also saw and listened to both co-trustees, Hermann H. Kind and his mother, as they testified. In addition he saw and listened to the decedent's two daughters, as well as Voss, the business manager of Graef & Schmidt, Inc., who from time to time was asked to explain many of the remarks contained in the letters which were exchanged between the parties involved. The Trial Judge found that the "sale was made for a valid consideration, the value of the Graef & Schmidt, Inc. business at the time of the transfer and the additional con-

sideration of the shares being within the limits of sound business judgment the value of the debts due to the Estate" and that "there is nothing in the conduct of the parties on and after the date of the receipt of the acceptance of the offer of November 24, 1939, that in any way qualifies the Trustees' full and complete ownership and control of the corporation and many statements in the letters of Iwersen, Bonner and Voss, as well as those of Hermann Kind, show that all parties agreed that the stock belonged to the Trustees unconditionally" (Finding 9, R. pp. 410-411).

Rule 52(a) of the Rules of Civil Procedure provides in part as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

As there was ample evidence, documentary as well as oral, supporting the Trial Judge's decision, the Circuit Court of Appeals erred in reversing it to the extent it did. Concededly there were some exhibits which if unexplained might give rise to a *suspicion* that the sale was not a *bona fide* one. These exhibits were given an exaggerated importance by the Circuit Court of Appeals, which at the same time totally ignored—at least in its opinion—the many clear and unequivocal bits of evidence which supported the findings of the Trial Judge.

We do not feel it either proper or necessary to discuss in this brief all of the evidence which is contained in the record either for or against the proposition that the sale of the stock to the estate was *bona fide*. We deem it sufficient merely to set forth some samples of the copious evidence which justified the Trial Judge in making his decision.

1. *As to the "business motives" of the deal.*

As of December 31, 1938 the book value of the stock, as certified by Arthur Young & Company was approximately $145,000. The testimony shows that because of the increased tariff in April, 1939 on importations and the boycott on German-made goods following the outbreak of the war the value of the stock had probably decreased to nearer $130,000 by October, 1939 (R. 39, 40, 142). Accordingly with the stock of J. A. Henckels, Ltd. already seized by the Canadian authorities, and the stock of Fifth Avenue Cutlery Shop, Inc. deemed worthless, how can it reasonably be argued that ordinary business motives were lacking when the estate suggested releasing Henckels K. G. and Iwersen of their $130,000 indebtedness if they unconditionally transferred the stock to the Estate? And yet Judge FRANK asserted in his opinion that the facts of the deal "shriek for explanation."

Since at the time in question Graef & Schmidt, Inc. owed Henckels K. G. $134,000 the Circuit Court of Appeals claims that the following is what the estate should have done if it really desired to protect its interests to the full: (1) Foreclose on the stock which it held as pledge for the $130,000 indebtedness and sell it at public auction (2) bid it in at the sale and (3) if any deficiency occurred, attach the debt which Graef & Schmidt, Inc. owed Henckels K. G. to the extent of such deficiency

While at first blush it might seem that the rigorous course suggested by the Circuit Court of Appeals might realize the *maximum* return for the estate we do not believe that it was incumbent on the trustees, who had had honorable and friendly business dealings with Henckels K. G. for many years to at once become "Shylocks", and exact the last penny at a time when the German source of im-

ports was hard pressed because of the international situation. Add to this the fact that one of the debtors, Iwersen, was also a co-trustee of the estate, and it must be apparent that these people had neither the motive nor inclination to proceed in such a harsh and inequitable manner.

The Circuit Court of Appeals, however, gravely erred in concluding that a sale of the stock at public auction would have been a simple matter. That Court evidently failed to note that the stock which was pledged as collateral was located in the personal safe deposit box of Iwersen who alone had access thereto (Ex. JJ-1, R. 297). If, therefore, the estate had simply declared its intention to foreclose on its collateral and threaten to attach any funds due Henckels K. G. by Graef & Schmidt, Inc. for any deficiency it is only reasonable to assume that Iwersen, then in the employ of Henckels K. G. and an American citizen residing in Germany, would have been unwilling to cause the stock certificates to be delivered to the estate for such a forced sale. And without the stock in their possession how would Hermann Kind and his mother have dared to sell the stock at public auction? It must seem obvious, therefore, that it was to the best interest of the estate to negotiate an amicable transfer of the stock. To effect this, however, it required the cooperation and consent of Henckels K. G. and Iwersen. Finally, since the agreements covering the pledging of the stock were silent as to the method of serving notice of foreclosure on the debtors, the technical and rather involved procedure of the New York Lien Law concerning the service of notice on the debtor and advertising the sale would have had to be complied with. See *New York Lien Law*, Sections 201, 202. Such procedure was naturally complicated by the fact that both debtors were in a foreign country, with which communication might be stopped at any moment.

2. *As to Hermann H. Kind's real intention.*

In its opinion the Circuit Court concluded "(2) We think that the evidence, narrated above, plainly shows that one of these two, (*i. e.* plaintiffs) Hermann, intended that the seeming purchase of the stock by the estate should not be a reality but a mere form employed to deceive the United States" and "(3) The estate thus never gave a real assent, since one of its trustees, Hermann, did not intend to assent; (4) This fact was known to Iwersen and Henckels K. G., the alleged sellers of the stock" (R. 440).

Without discussing the question of whether the evidence "narrated" by the Circuit Court justified its conclusions above referred to, it is submitted that the Court ignored or glossed over considerable evidence showing a contrary intent on the part of Hermann H. Kind, Iwersen and Henckels K. G. Such additional evidence amply supported the findings made by the District Court that the purchase of the stock by the estate was *bona fide*. Examples of such evidence are as follows:

(a) Hermann H. Kind prepared and sent quarterly reports to his co-trustees, his mother and Iwersen, setting forth the financial affairs of this estate. In his report covering the last quarter of 1939 he noted the purchase of the stock by the estate and declared that it had thereby become "the sole owner of these companies" and that the debts had been "liquidated" (Ex. 23, R. 348).

(b) Kind obtained the pledged stock certificates from Iwersen's safe deposit box and had them transferred into the name of the estate (R. 45).

(c) Iwersen wrote to his business associate Voss "our debts have in fact been discharged by the surrender of the shares (Ex. 25a, R. 323; Ex. 28a, R. 322; Ex. 26a, R. 331).

(d) Kind sent his mother an appropriate receipt and release for her to sign, and in a covering letter explained to her "These shares, as you know, were transferred to the trustees in liquidation of the debts owed to the Estate by Graef & Schmidt, Inc. and J. A. Henckels, Solingen, and the receipt enclosed is required by J. A. Henckel in order to complete the transaction" (Ex. 18, R. 353; Ex. 19, R. 353).

(e) On November 28, 1939 Iwersen wrote the Reichsbank that the transfer of stock was made to the estate in settlement of existing claims (Ex. 33a, R. 320).

(f) On November 29, 1939 Iwersen wrote Kind that Henckels K. G. and Iwersen had accepted the proposals made by the Estate through its attorneys, and "in all probability the shares have already been transferred to the Estate" (Ex. 28a, R. 322).

(g) Earlier, on November 13, 1939 Iwersen had already written Voss "we have surrendered voluntarily to O'Connor & Farber the stock of all three corporations" (Ex. JJJ-1, R. 307).

(h) On December 13, 1939 Iwersen advised Bonner, the bookkeeper of Graef & Schmidt, Inc. that the debt had been paid and that the "Estate is the owner of the firm" and that "the firm does belong to the estate" (Ex. 27a, R. 340, 341).

(i) After becoming the owners of the stock the trustees, according to Kind, "on consultation with our lawyers, • • • decided to liquidate the corporation" (R. 46). Kind advised Iwersen of the intention to liquidate (Ex. 31, R. 381). Thereupon at a special meeting of the stockholders of Graef & Schmidt, Inc. with Kind presiding as president, the estate voted all of the stock in favor of liquidation,

a distribution of all of its assets, and the filing of a certificate of dissolution with the Secretary of State of New York (Ex. 21, R. 387).

(j) Voss wrote Henckels K. G. on April 10, 1940 "Since the stock of this corporation was taken over by the trustees of the Estate of Hermann Kind, the directors have been making plans for the liquidation of the business of the corporation" (Ex. 36, R. 365).

(k) Kind wrote to Iwersen on November 13, 1940 concerning dividend payments to the estate "These payments represent the first liquidating dividends which the estate will receive from Graef & Schmidt since becoming the owner of the shares a year ago" (Ex. 31, R. 381).

(l) Iwersen wrote Kind on December 11, 1940 "But now that the debts that arose have been compensated for by our having transferred all of the shares of the estate, there is no reason at all why these accounts I and III (referring to accounts receivable due Henckels K. G. by Graef & Schmidt, Inc.) should not be paid" (Ex. 32a, R. 391).

From the foregoing discussion it is clear that the Circuit Court violated Rule 52(a) of the Federal Rules of Civil Procedure in that there was ample evidence to support the findings of fact of the District Court, and they, therefore, could not be "clearly erroneous." Nor can the Circuit Court get around the effect of that rule by saying "we rely on the documentary evidence which we are in as good a position as the Trial Judge to interpret." As stated above the Circuit Court relied on only part of the documentary evidence, and in none of that was there an unequivocal statement by Hermann H. Kind that he understood that the deal which the estate's attorneys had negotiated was not the "real" one. At most the documentary evidence relied on by the Circuit Court contains some

equivocal or ambiguous remarks, and the Trial Judge heard and saw Hermann H. Kind, his mother, and Voss as they testified and explained some of those remarks. Since the sole issue was one of intent the Trial Judge was in the best position to arrive at the correct answer. Kind, a native-born United States citizen testified that he was a member of the town council of his community, a graduate of an American college, and chairman of both the Red Cross and Community Chest drives in his town (R. 29). All this must have been considered by the Trial Judge in deciding whether or not Kind deceived his own mother, a co-trustee, or attempted to conceal something from his own country. If there had been any desire to defraud this country certainly the parties would have sought to conceal the large indebtedness which Graef & Schmidt, Inc. owed Henckels K. G. in the sum of $134,000. And yet this was never concealed and was paid off leisurely over a period of 2 years (Ex. 39, R. 397, 398).

POINT II.

The Circuit Court's reversal of the Trial Court's findings of fact was in conflict with the decisions of the Circuit Court of Appeals for the Sixth, Seventh, Ninth and Tenth Circuits.

The Circuit Court of Appeals for the Sixth Circuit, in following Rule 52(a) has declared:

> "Where a case is tried by the court, a jury having been waived, the court's findings upon questions of fact are conclusive upon appeal, no matter how convincing the argument that upon the evidence the findings should have been different unless there is no substantial evidence to support them."

Andrew Jergens Co. v. *Conner* (C. C. A., 6), 125 Fed. (2d) 686 at page 689.

The Circuit Court of Appeals for the Seventh Circuit has stated:

> "Where parties may differ as to the correct solution of the factual problem faced, it is the duty of a court of review to refrain from attempting to substitute its findings for those of the trial court. It matters not that we might have arrived at a conclusion at variance with that of the trial court. Where as here the trial tribunal has observed the witnesses and made voluminous detailed findings supported by substantial evidence, we are unable to say that the situation contemplated by the rule,—that the findings are clearly erroneous,—is presented."

Gary Theatre Co. v. *Columbia Pictures Corporation* (C. C. A., 7), 120 Fed. (2d) 891, at page 894.

For similar expressions by the Courts in the Ninth and Tenth Circuits see:

O'Keith v. *Johnston* (C. C. A., 9), 129 Fed. (2d) 889, at page 891;

United States v. *Protsch* (C. C. A., 10), 137 Fed. (2d) 92, at page 94.

Certainly the Circuit Court of Appeals for the Second Circuit in the instant case differs with the other circuits mentioned above as to the scope of its power under Rule 52(a) to disturb the findings of fact of the Trial Court.

POINT III.

The Circuit Court's reversal of the Trial Court's findings of fact was in conflict with its own decisions in other cases.

In *United States* v. *Lambert,* 146 Fed. (2d) 469, the Circuit Court for the Second Circuit, through its Senior Judge LEARNED HAND, stated at page 471:

> "We must affirm the findings unless they are clearly erroneous."

In this he was joined by Judges A. N. HAND and CHASE. Similar comment was made by Senior Judge LEARNED HAND in *United States* v. *Aluminum Co. of America* (C. C. A., 2), 148 Fed. (2d) 416, at page 433, the other judges being Judges A. N. HAND and SWAN.

In the instant case the Circuit Court consisting of Judges FRANK (writing the opinion), SWAN and CHASE, the above rule was not complied with, and the Court obviously proceeded to try the case *de novo.* In this connection it is interesting to note that in a subsequent case also involving property vested by the Alien Property Custodian, the Trial Court's findings were affirmed by the Circuit Court (Judges LEARNED HAND, A. N. HAND and SWAN sitting). Senior Judge LEARNED HAND again stating that:

> "The only question is whether the district judge's findings were 'clearly erroneous' that the enemy-owned property seized by the Property Custodian had been lawfully transferred to the plaintiff, an American citizen, and belonging to him when seized."

See *Brassert* v. *Clark,* decided July 30, 1947, and not yet officially reported. There the same Court applied Rule 52(a) to an Alien Property Custodian case in the same manner as it did in the other cases hereinabove cited. It is therefore all the more difficult to understand why the plaintiffs herein were not accorded the same treatment.

POINT IV.

The Circuit Court has decided an important question involving the law of trusts which is clearly in conflict with the decisions of the New York courts.

The stock in question was located in New York and the agreements relating to the pledging thereof all recited that the laws of the State of New York should govern (Ex. 5, R. 209; Ex. 6, R. 228; Ex. 7, R. 230). The Circuit Court held that Hermann Kind, as one of the trustees, never gave his real assent to the purchase of the stock and that this fact was known to the co-trustee Iwersen, as well as Henckels K. G. (R. 440). If that were so then Kind and Iwersen not only deceived their co-trustee, Johanna M. Kind, but also secretly agreed to an arrangement which was more favorable to Iwersen as one of the debtors of the estate. Under New York law such secret deal would never be enforced to the detriment of the estate. On the contrary the New York courts would enforce the deal which the estate's attorneys had negotiated and which both Kind and Iwersen led Johanna M. Kind to believe was the real deal.

As stated by Mr. Justice CARDOZO in *Meinhard* v. *Salmon*, 249 N. Y. 458, at page 464:

> "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions (Wendt v. Fischer, 243 N. Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

See also, *City Bank Farmers Trust Co.* v. *Cannon*, 291 N. Y. 125, where the Court of Appeals declared, at page 131:

> "The standard of loyalty in trust relations does not permit a trustee to create or to occupy a position in which he has interests to serve other than the interest of the trust estate. Undivided loyalty is the supreme test, unlimited and unconfined by the bounds of classified transactions."

In holding that the deal which the estate's attorneys had negotiated was not binding because of a secret understanding between Kind and Iwersen the Circuit Court failed to apply the controlling law of New York above referred to.

POINT V.

The decision of the Circuit Court is in conflict with and contrary to the decision of this Court as to the purpose of the Trading With the Enemy Act.

As stated above, all of the beneficiaries of the estate, including the trustee-plaintiffs herein, are native-born United States citizens. The Circuit Court by its harsh analysis of the evidence and unwillingness to give the necessary weight to the findings of the Trial Court has directed that these citizens be deprived of part of their property. Certainly the provisions of the Trading With the Enemy Act must be broadly construed to give effect to its remedial purpose. The Circuit Court's decision, on the other hand, amounts to confiscation and is therefore contrary to the decision of this Court in *Becker Steel Co. of America* v. *Cummings*, 296 U. S. 74, 56 S. Ct. 15, wherein it stated:

> "But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends."

See also *Reising* v. *Deutsche Dampfschiffahrts Gesellschaft Hansa*, 15 Fed. (2d) 259, and *Von Schwerdtner* v. *Piper, et al.*, 23 Fed. (2d) 862.

POINT VI.

The decision of the Circuit Court is in conflict with the decisions of the federal courts following World War I as to the type of property or property rights which may be seized by the Alien Property Custodian.

The Circuit Court would make it appear that the plaintiffs' right to recover the vested stock depended on whether or not the co-trustee Kind really assented to the offer made by the estate's attorneys on October 24, 1939 (Ex. 11, R. 290). Actually the only real question presented by the record was whether at or shortly after the time Iwersen and Henckels K. G. formally accepted the offer made by the estate's attorneys, Iwersen was able to exact a secret agreement whereby, if the estate realized more than $130,000, plus interest, when it disposed of the surrendered stock, any surplus would be returned to Henckels K. G. and Iwersen. Never once did Iwersen or Henckels K. G. claim, after their acceptance on November 6, 1939 (Ex. 12, R. 297; Ex. 13, R. 300), that the stock of Graef & Schmidt, Inc. nevertheless still belonged to them and was still only held by the estate as collateral. Instead, Iwersen tried to exact an understanding as to a possible surplus (Ex. 14, R. 301). This was turned down by the estate's attorneys (Ex. 15, R. 316). Thereafter Iwersen sought to get a private letter from the beneficiaries of the estate covering the matter of a possible surplus (Ex. DDDD-1, R. 350; Ex. RR-1, R. 357). Kind, however, testified that no such agreement was ever given (R. 93), and that he never even asked his mother and sisters for their consent (R. 94, 108). His testimony was corroborated by both sisters and his mother (R. 180, 184). Voss, who the Trial Judge declared was a truthful witness (R. 419), testified that Kind said he would never write a letter concerning a surplus, and that he, Voss, knew of no

arrangement with the estate concerning a surplus (R. 142, 143). Finally, Iwersen had to admit to the German authorities that he was unable to get a confirmation from the estate concerning a possible surplus but that "the situation is this, that our New York manager (*i. e.*, Voss) has informed us in writing that the testamentary trustee in charge over there (Mr. Hermann Kind) has orally expressed to him his agreement" and that, therefore, the only thing that was involved was "a gentlemen's agreement" (Ex. VV-1, R. 369).

It is obvious that the German authorities wanted to be sure that Henckels K. G. and Iwersen had not given stock to the estate for $130,000 if it was worth much more than that, and that explains why Iwersen felt obliged to satisfy them that if a surplus was ever realized he would try to get it. Both Kind and Voss testified, however, that at the time of the deal the stock was not worth more than $130,000 (R. 40, 142) and it is therefore preposterous to assume that they would have wracked their brains on how to conceal from the United States a most improbable surplus and at the same time do absolutely nothing toward concealing the debt of $134,000 which Graef & Schmidt, Inc. owed Henckels K. G.

Iwersen had never advised either Kind or Voss of the representation he had made to the German authorities (R. 107, 123), and it is fair to assume that the representation was slightly colored to meet his personal situation in Germany. In any event it should be noted that Voss testified that Kind had never stated to him that the estate would be willing to pay over the surplus (R. 146) and thus contradicts Iwersen's remark about "our New York manager".

We need not discuss herein whether such a "gentlemen's agreement" was ever actually made or whether, if made, it was binding on the estate. The fact is that when

the stock was seized by the Alien Property Custodian the estate had not realized any "surplus," and the stock had not been disposed of.

It has been repeatedly held in connection with seizures during World War I, that the Custodian takes only such legal right, title or interest as the enemy had at the time of the seizure. See *Stoehr* v. *Wallace* (S. D., N. Y.), 269 Fed. 827, 835, 840-1; affirmed 255 U. S. 239; *Farmers Loan & Trust Co.* v. *Miller* (S. D., N. Y.), 2 Fed. (2d) 483; reversed on other grounds in 9 Fed. (2d) 848; *Polaroid Corporation* v. *Markham* (C. of A., D. C.), 148 Fed. (2d) 219; *Sutherland* v. *Selling* (C. C. A. 9), 16 Fed. (2d) 865, 868; cert. den. 273 U. S. 760; *Becker* v. *Miller* (C. C. A. 2), 7 Fed. (2d) 293; appeal dismissed 269 U. S. 596; *Matter of People (Second Russian Ins. Co.),* 256 N. Y. 177, 188; cert. den. 284 U. S. 678; *Kahn* v. *Garvan* (S. D., N. Y.), 263 Fed. 909, 912; *U. S.* v. *The San Leonardo* (E. D., N. Y.), 51 Fed. Supp. 107; *Matheson* v. *Hicks* (E. D., N. Y.), 10 Fed. (2d) 872.

As of the date of the vesting order (*i. e.,* January, 1943) there was no "surplus" which could have been vested. Furthermore, if prior to our entry into the war an enforceable contract concerning the turning over of a surplus, if, as and when realized, had been entered into, it was still an executory contract upon the entry of the United States into the war in 1941 and therefore was terminated by the war and not merely suspended. See *Joring* v. *Harriss, et al.* (C. C. A. 2), 292 Fed. 974; *The William Bagaley,* 72 U. S. 377, 407 (5 Wall.); *Griswold* v. *Waddington,* 16 Johns (N. Y.) 438, 503; *Matheson* v. *Hicks* (E. D., N. Y.), 10 Fed. (2d) 872; *Rossie* v. *Garvin* (D. C., Conn.), 274 Fed. 447.

It is obvious that the Circuit Court attempted to circumvent the above authorities concerning the non-vesting of inchoate rights and the abrogation of executory contracts

by war; and it did so by simply declaring that the necessary unanimous consent to the stock purchase had not been obtained from all of the trustees and that the original secured debt therefore remained unchanged. By giving the estate the amount of its security interest the Circuit Court has succeeded in awarding any surplus arising from the sale of the stock to the Custodian. In doing so it has violated the principles so firmly established in the above cited cases.

Conclusion.

For the reasons stated in the petition and in this brief, the application of the cross-petitioners herein for a writ of certiorari should be granted.

Respectfully submitted,

ARNOLD T. KOCH,
Counsel for Cross-Petitioners, Johanna M. Kind and Hermann H. Kind, as Trustees under the Last Will and Testament of Hermann Kind, Deceased.

(APPENDIX FOLLOWS)

APPENDIX.

Trading With the Enemy Act

(50 U. S. C. A. App. Sections 1-31)

Sec. 2. The word "enemy" as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

> (a) Any individual, partnership, * * * of any nationality resident within the territory * * * of any nation with which the United States is at war * * *.

Sec. 5 (As amended by the First War Powers Act of 1941, C. 593, Sec. 301, 55 Stat. 839)

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> > (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, * * *.

Sec. 9(a)

Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; * * * if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, * * * (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *.

INDEX

CITATIONS

761422—47

In the Supreme Court of the United States

OCTOBER TERM 1947

No. 326

JOHANNA M. KIND AND HERMANN H. KIND, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HERMANN KIND, DECEASED, CROSS-PETITIONERS

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 426–442) is reported at 161 F. 2d 36. The opinion of the district court (R. 404–424) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on April 9, 1947 (R. 442). On July 8, 1947, the time within

which a cross-petition for a writ of certiorari might be filed was extended by the Chief Justice to September 6, 1947. The cross-petition for a writ of certiorari was filed on September 5, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code.

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, as amended, are set forth in the Appendix to the petition for a writ of certiorari, No. 309, this Term.

QUESTION PRESENTED

Whether the circuit court of appeals properly set aside the ruling of the district court that the estate of which the cross-petitioners are trustees owned certain stock, and that a purported release and transfer of the shares by enemy interests to the American estate was not, as the circuit court of appeals thought, a "mere form employed to deceive the United States" in violation of the Trading with the Enemy Act.

STATEMENT

The cross-petition for a writ of certiorari is largely devoted to an attack on the correctness of the circuit court of appeals' rejection of the finding of the district court that the transfer of certain enemy property to the estate of which the cross-petitioners are trustees was valid and *bona*

fide. The facts are set forth in the petition for certiorari filed on behalf of Tom C. Clark, Attorney General (No. 309, this Term, filed August 29, 1947) and in the opinion of the circuit court of appeals (R. 426, 427–437). Briefly restated, those pertinent to the question presented by the cross-petition are as follows. The elder Hermann Kind, husband and father of the cross-petitioners, and, after his death, his estate, had for more than 50 years prior to the transaction in question been closely associated with J. A. Henckels K. G., a German co-partnership, and its American subsidiaries, including Graef & Schmidt, Inc. (R. 427, 428). The trustees of the estate in 1939 were the cross-petitioners, Hermann H. and Johanna Kind, and one Iwersen, who was also general manager of Henckels K. G. (R. 428). At that time, as the result of a complex reshuffle of the American holdings of Henckels K. G., implemented by a series of agreements between Henckels K. G. and the estate, the former owed the latter $130,000, secured by a pledge of the stock of Graef & Schmidt, Inc., the property in question in this case (Findings 3, 4, R. 405–6; R. 37, 39, 428). Graef & Schmidt, Inc., owed Henckels K. G. $134,000 (R. 117, 437).

In late September, 1939, Iwersen by cable and letter suggested that the estate take over the Graef & Schmidt stock in order that "the enterprises over there could be saved from a foreign

seizure" (Ex. CC 1, R. 272, 273). Iwersen emphasized that "at the end of the war" the estate was to make "a fair settlement of accounts (*Id.* at p. 274)—*i. e.*, return to Henckels the value of the Graef & Schmidt stock over and above the estate's security interest. At about the same time, Iwersen warmly assured the Devisenstelle and other German authorities that "the Estate of Hermann Kind will submit an exact accounting; in other words, that the interests of the firm of J. A. Henckels, Solingen, and thus the interests of the German Reich, as regards devisen, will be safeguarded in every respect" (Ex. BB 1, R. 269, 270). Hermann H. Kind and his associates were informed of these assurances (Ex. CC 1, R. 272, 274).

Much of the ensuing correspondence was between Iwersen and Voss or Bonner, respectively the Vice-President and Treasurer of Graef & Schmidt (R. 131, 132), rather than directly between Hermann H. Kind and Iwersen. Kind, however, carefully studied the letters Voss and Bonner received from Iwersen; their letters to Iwersen were "sometimes discussed with Hermann Kind before sending and always read by Hermann Kind after sending" (Finding 11, R. 411; Ex. II, R. 292, 294; Ex. I, R. 318; Ex. TTT, R. 334; Ex. BBB, R. 343; Ex. 30, R. 367). At the "suggestion" of Iwersen, Hermann Kind became President of Graef & Schmidt early in 1940 (R. 34; Ex. BBB, R. 343).

On October 24, 1939, the law firm of O'Connor & Farber, acting on behalf of the estate, addressed a letter to Iwersen and Henckels K. G., which purportedly offered to release the $130,000 indebtedness in consideration of the transfer by Henckels K. G. to the estate of all right, title, and interest in the pledged shares (Ex. 11, R. 290). On November 6, Iwersen, on behalf of himself and Henckels, cabled an acceptance (Ex. 12, R. 297). But on the same day Iwersen wrote O'Connor & Farber a letter which concluded (Ex. 14, R. 301, 302):

> If we have given our unconditional consent it is with the clear understanding that the Estate will pay itself by administrating or possibly liquidating the corporations of our property, and, therefore, all values saved over and above the claims of the Estate of Hermann Kind will be held at my disposal or at the disposal of J. A. Henckels Kommandit-Gesellschaft as the interests may be. In due time we expect a full and detailed statement of all transactions made.

On November 14, Voss wrote Iwersen that this "acceptance" was unsatisfactory to O'Connor & Farber, because it "would give an opening to a possible U. S. A. Alien Property Custodian" (Ex. NN, R. 308, 309), and two weeks later O'Connor & Farber wrote Iwersen to request from him and Henckels K. G. a letter releasing unconditionally all interest in the stock (Ex. 15, R. 316). Simultaneously, Voss and Hermann Kind wrote Iwer-

sen that "you may rest assured * * * that everything is being done to safeguard the interest of the firm Henckels" (Exs. I, J, R. 318, 319). Also, on November 28, Voss dispatched to Iwersen a "private letter", confirming his (Voss') understanding that the transfer was a pure formality, that some day there would be an exact accounting, and that the surplus would be returned to the German firm (R. 135, 139–141). While it does not appear that this "private letter" was shown to Kind, Iwersen referred to it and recapitulated its substance in an answering letter, dated January 6, 1940, to Voss (Ex. DDDD 1, R. 350), which Kind saw and discussed with Voss. Iwersen at the same time wrote to Kind, requesting written confirmation of the latter's understanding of the true nature of the transfer, adding that "the lawyers need not know anything about the letter" (Ex. PP 1, R. 352). On January 18, 1940, Voss and Kind, after consultation, replied that, while such a letter would not be in the interest of Henckels, because "in the event of war everything over $130,000 could be seized", the estate was, if Henckels insisted, willing to furnish it—adding that the "lawyers have nothing to do with this" (Ex. OO 1, R. 354; R. 93–94, 140–141; Ex. QQ, R. 357; R. 433). Iwersen thereupon wrote Kind that he would no longer insist on a writing, since the assurance of the estate's willingness was sufficient (Ex. RR 1, R. 357; R. 434). Meanwhile, on December 12,

1939, Iwersen and Henckels sent O'Connor & Farber a letter purporting unconditionally to release the pledged shares (Ex. 18, R. 353). Further correspondence did nothing to alter what Iwersen described as a "Gentlemen's Agreement" (Ex. VV 1, R. 369–370) and as late as November 26, 1940, Bonner wrote Iwersen that "although a possible surplus would be treated in accordance with the viewpoints set out in Mr. Voss' letter of November 28, 1939, the purely legalistic basis is nevertheless entirely different" (Ex. BBBB 1, R. 383, 385, 436). This letter was initialled by Kind (R. 144–145, 436). Iwersen reiterated his understanding that the transfer was a pure formality and that when circumstances permitted, the estate would refund the value of the shares in excess of its claim (Ex. GGGG 1, R. 382; Ex. JJJJ 1, R. 392; R. 436). The trustees never contradicted Iwersen in this understanding.

Graef & Schmidt, now ostensibly owned by the estate, remitted the full $134,000 to Henckels (R. 124, 168, 437) but had paid the estate in "dividends" only $63,000 before a freezing order precluded further payments (R. 11, 111). As Judge Frank, writing for the court below, has stressed, the estate, by foreclosure and sale of the stock, and if necessary, attachment of Henckels' claim against Graef & Schmidt, could have put itself in a far more favorable position to collect its claim against Henckels (R. 438–439).

ARGUMENT

1. The first three points of the cross-petitioners' argument (Cross-Pet. 10, 23, 25) amount to a claim that the circuit court of appeals could not, on the evidence, properly treat as "clearly erroneous" the findings of the trial court that the "transfer" of the shares was valid and *bona fide*. Such a question, having no significance beyond the case at bar, is not a ground for the issuance of a writ of certiorari. *United States* v. *Johnston*, 268 U. S. 220, 227; *Federal Trade Commission* v. *American Tobacco Co.*, 274 U. S. 543, 544; *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; *cf. Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 509. In any event, on the record as a whole, it is abundantly clear that the circuit court of appeals, fully mindful of the requirements of Rule 52 (a) of the Rules of Civil Procedure, decided the question correctly.

2. In Point IV of their argument (Cross-Pet. 26–27), the cross-petitioners urge that the decision below conflicts with decisions of the New York courts holding trustees to strict fiduciary obligations. The relevance of these decisions is obscure: assuming, *arguendo*, that consummation of the secret deal would have been detrimental to the estate and that it would be denied enforcement by the New York courts, there is no justification for reading into the decision below a contrary view. Nowhere does the court below suggest that

the secret agreement is enforceable; if it did, there might be some basis for the contention that the trustees were not held to as high a standard of loyalty as they should have been. The only relevance of the secret agreement to the court below was the effect it had of making it plain that neither party intended an outright transfer and sale of the stock. The true effect of the secret understanding was to negate the intent necessary to a valid transfer.

3. Point V (Cross-Pet. 27) is insubstantial. It is simply a restatement of the plaintiffs' contention that Henckels K. G. was not the beneficial owner of the shares. If the cross-petitioners are wrong in this, as we think they are, there could be no "confiscation of the property of citizens".

4. Point VI is similarly without substance (Cross-Pet. 28–31). The point seems to be based on the argument that since, at the time of the Vesting Order, the value of Henckels' equity in the stock was unascertained, no property existed which was subject to vesting. But prior to the sham transfer, the Germans were the beneficial owners of the shares, subject only to the plaintiffs' security interest. Since the ostensible transfer was a nullity, the beneficial ownership was retained by the Germans and properly vested by the Alien Property Custodian (R. 12). *Cf. Stoehr* v. *Wallace,* 269 Fed. 827, 838 (S. D. N. Y.), affirmed, 255 U. S. 239; *Matheson* v. *Hicks,* 10 F.

2d 872, 873 (E. D. N. Y.); *Standard Oil Co.* v. *Markham,* 64 F. Supp. 656, 664–665 (S. D. N. Y.). That the value of the vested property was conjectural is of no moment.

CONCLUSION

The decision of the court below on the questions presented by the cross-petition is correct, and there is no conflict of decisions. The cross-petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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JOSEPH W. BISHOP, Jr.,
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SEPTEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

No. 326

IN THE

Supreme Court of the United States

October Term, 1947

JOHANNA M. KIND and HERMANN H. KIND, as Trustees under the Last Will and Testament of HERMANN KIND, Deceased,

Cross-Petitioners,

v.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS IN REPLY.

ARNOLD T. KOCH,
Counsel for Cross-Petitioners, Johanna M. Kind and Hermann H. Kind, as Trustees under the Last Will and Testament of Hermann Kind, Deceased.

IN THE

Supreme Court of the United States

October Term, 1947

JOHANNA M. KIND and HERMANN H. KIND, as Trustees under the Last Will and Testament of Hermann Kind, Deceased, *Cross-Petitioners,* *v.* TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian, *Respondent.*	No. 326

BRIEF FOR PETITIONERS IN REPLY.

The evidence referred to on page 4 of his opposing brief as supporting the claim of the Circuit Court of Appeals that the transfer of the stock was fictitious, typifies the peculiar idea the defendant has as to the quantum of proof he needs to wrest property from an American estate, for the ultimate possible benefit of a former enemy alien.

In claiming that the contracting parties did not mean what they were doing in entering into the agreement of October 24th—November 6, 1939, the respondent refers to (1) Iwersen's statement of September 26, 1939 to Voss, an official of Graef & Schmidt, Inc., and not an agent of the Estate, that he, Iwersen, assured the German Foreign Exchange Control that "at the end of the war" the estate was to make "a fair settlement of accounts" (Ex. CC-1, R. 274); and (2) Iwersen's letter of September 13, 1939 to the

German Supervisor of Finance that "the Estate of Hermann Kind will submit an exact accounting; in other words that the interests of the firm of J. A. Henckels, Solingen, and thus the interests of the German Reich, as regards devisen will be safeguarded in every respect" (Ex. BB-1, R. 270).

Obviously the German nation, at the threshold of a new war, was anxious that no German assets located in foreign countries be allowed to disappear or be sold without fair consideration, and Iwersen's position at that time—an American located in Germany—was probably not an enviable one, was viewed with suspicion by the Germans, and accounted for his profuseness in assuring the Germans that no German assets would be dissipated. However, his assurances, quoted above, were entirely innocuous, and in no way afford a basis for any cloaking scheme.

At the outbreak of the war the assets of the German firm consisted of a debt of Graef & Schmidt, Inc. of $134,000, and an equity in the stock of that corporation which had been pledged with the Estate. All credible testimony showed that such equity at that time was negligible, if not worthless (R. 39, 40, 142). Accordingly the only matter of substance as to which Iwersen could possibly have tried to satisfy the German authorities was the assurance that if the Estate took over the stock and then controlled and operated the corporation it would account for the substantial moneys that corporation owed Henckels K. G. Certainly there was nothing sinister in such an assurance.

Another display of suspicion running rampant is the sinister implication given the assurance found by the respondent (p. 6) and the Circuit Court of Appeals (R. 430-431) in what to us is perfectly harmless, namely, the statement by Voss to Iwersen, and endorsed by Hermann Kind,

"that everything is being done to safeguard the interest of the firm Henckels" (Ex. 1, R. 318).

The record shows that up to the end of 1939 Kind had been working merely as a salesman of Graef & Schmidt, Inc. (R. 33), whereas Voss, a much older man, had been in an executive position second only to that of Iwersen (R. 131). Accordingly, Iwersen had some concern as to how those two parties would "pull together" when the younger, Kind, was elevated to the position of presidency. This concern Iwersen voiced to Voss in a letter of November 13, 1939 (Ex. JJJ-1, R. 308), and to allay his fears, Voss replied on November 28, 1939, in the letter referred to by respondent, that the "best harmony exists between us" and to emphasize this fact he had Kind sign the letter as well (Exs. I, J, R. 318-319). And in so far as possible dissension might also worry the largest creditor, Henckels K. G., the writer also made the assurance, which to the respondent seems so sinister, "that everything is being done to safeguard the interest of the firm Henckels."

Exception is also taken to the remark on page 6 of respondent's brief that "Iwersen thereupon wrote Kind that he would no longer insist on a writing, since the assurance of the estate's willingness was sufficient (Ex. RR-1, R. 375, R. 434)." As we read Iwersen's letter we see nothing but disappointment therein over the fact that he did not get the assurance he wanted from the Estate, as to a surplus. Subsequently he admitted to the German authorities that "the Estate has not expressly confirmed this obligation"; that at best he had a "Gentlemen's Agreement", based solely on information he had received from "our New York manager" (Voss) (Ex. VV-1, R. 370). This was denied by Voss (R. 146). In any event Voss had no authority to speak for the Estate (R. 138).

The Importance of This Case.

The cases cited on page 8 of respondent's brief merely state the proposition that, generally, this Court will not grant certiorari to review evidence and discuss facts. Petitioners, however, urge that their application involves much more than a request to review evidence. It involves the serious question of what kind of treatment is to be accorded to United States citizens by the respondent and by the courts in connection with their efforts to recover their property vested under the Trading With The Enemy Act. Is the purpose of that Act merely to protect our nation in time of war by seizing property which might be used against it during the war, or is the purpose to punish and wreak vengeance on United States citizens if they were guilty of conduct which might possibly be capable of unfavorable construction? Shall these persons be entitled to the application of the principles of evidence applicable in the ordinary civil case, or are they to be presumed guilty because they happened to transact ordinary commercial matters with people who subsequently became their foes? It is clear that until this Court speaks on the subject the respondent will believe that he may confront plaintiffs with documents, hearsay and other types of evidence which under no conceivable basis would be admitted in any other kind of a case.

In the case at bar the defendant offered in evidence documents addressed by one German official to another, or by Iwersen, or Henckels K. G., to German officials. Plaintiffs knew nothing about those documents and never saw their contents until the trial herein (R. 107, 176) and yet the defendant did not hestitate to use them although they could not possibly have been binding on the plaintiffs. While the Trial Judge let them all in, he did subsequently declare in his decision that they were incompetent (R. 419). A typical

example of defendant's misconception of the extent to which he should go in trying to prevent recovery of property claimed by United States citizens, was his introduction of a release by the German Minister of Finance to other German officials at the outbreak of the war concerning the protection of German property abroad, and suggesting various devices to circumvent seizure (Ex. AAA-1, R. 259). The defendant in no way sought to show that any of the parties in this action, or that even Henckels K. G. or Iwersen, knew of the existence or contents of that document. Obviously the defendant, by introducing that document, hoped to create a presumption that any business deal subsequently entered into between an American civilian and a German civilian having to do with the transfer of an asset, was a sham and solely motivated by the above edict. Lest such tactics be repeated in the countless other seizure cases awaiting trial, a pronouncement by this Court that this type of case must be tried and decided in the same manner as any other civil case should have a salutary effect.

In this connection it should be noted that the Circuit Court of Appeals also evinced a peculiar attitude—or bias—in its treatment of the evidence. Under the liberal rulings of the trial judge, the defendant was able to introduce many letters to German officials which the Judge subsequently conceded were incompetent (R. 419). Only one offer of proof was rejected, and that was when the defendant offered to prove that when the testator, Hermann Kind, in 1920, bought stock of a predecessor corporation from the Alien Property Custodian, he testified that it was not his intention to convey or transfer the same to the former German owners (R. 53). Such evidence was clearly incompetent, irrelevant and immaterial, and in no way binding on what the trustees did 19 years later. The offer was designed solely to put the plaintiffs in a prejudicial light.

Inasmuch as the defendant's proffer on this point was denied, there was of course no need for the plaintiffs to introduce evidence on the question of whether or not the testator was relieved, subsequent to 1920, from any undertaking not to sell to Henckels K. G. the stock which the testator had purchased from the Alien Property Custodian. While the defendant excepted to the trial judge's ruling, he did not press his claim of error before the Circuit Court of Appeals. Nevertheless, the Appellate Court eagerly grasped this offer of proof and displayed its propensity for suspicion when it stated in a footnote: "Appellants offered to prove that, before the deceased made this purchase (through an intermediary) he had stated under oath to the Alien Property Custodian that he agreed not to sell it to any firm or corporation not a citizen of the United States" (R. 427) thereby inferentially condemning a dead person who was not able to defend himself, and whose representatives deemed it unnecessary to defend him because of the favorable ruling of the trial judge. Inasmuch as sometime before his death in 1928, he had sold some of the stock back to Henckels K. G., it is obvious that the Circuit Court of Appeals preferred to believe that the testator had committed some fraud against his country, and that this set some sort of a pattern for his widow and son to follow in their dealings with the Germans in 1939. To anyone viewing the proffer of proof with an unbiased mind, it must be obvious that if the "intention" alleged to have been expressed by the testator in 1920 was, in fact, a commitment not to resell to the Germans, such restriction must have been removed in the course of time, and certainly no later than the early part of 1928, when under the Settlement of War Claims Act of 1928, enacted March 10, 1928 (45 Stat. 254, 50 U. S. C. A. Appendix, sections 9, 10, 20 *et seq.*) Congress authorized the Alien Property Custodian himself to return seized property to former German owners.

Finally, inasmuch as it deemed it necessary to refer to the fact, the Circuit Court of Appeals evidently saw something sinister in the testator's having purchased the stock "through an intermediary". Yet, here again, calmer reflection would immediately have appreciated that since the testator himself was required to testify that the stock would not be retransferred to the Germans, certainly the Alien Property Custodian was not deceived by the use of an intermediary and considered the testator as the real purchaser.

In conclusion, lest the manner in which the Circuit Court of Appeals ignored the painstaking findings of the Trial Court and let suspicion be the basis of its revised findings, be taken as a pattern in the trial and determination of future cases of this type, we strongly urge the intervention of this Court by granting certiorari herein.

Respectfully submitted,

ARNOLD T. KOCH,
Counsel for Cross-Petitioners, Johanna M. Kind and Hermann H. Kind, as Trustees under the Last Will and Testament of Hermann Kind, Deceased.